The Fair Housing Act: 35 Years of Evolution
By Tracey McCartney and Sara Pratt[1]

April 2003 will mark the 35th anniversary of the passage of the Fair Housing Act. Of all the legacies of Dr. Martin Luther King Jr., perhaps fair housing is his most profound, because his assassination in Memphis on April 4, 1968, was the catalyst for long-overdue Congressional action to make many kinds of private housing discrimination unlawful. Thus, a process that began in August of 1967 wrapped up with amazing speed amid civil unrest, and the Fair Housing Act[2] was signed into law by Lyndon B. Johnson on April 11, 1968, just a week after King's death.[3]

Even while Congress debated, however, the U.S. Supreme Court was hearing arguments in *Jones v. Alfred H. Mayer Co.*[4] and ruled in June 1968 that the Civil Rights Act of 1866[5] ("Section 1982") prohibited race discrimination in housing even among private parties. Before then, Section 1982 had been successfully applied only in cases of governmental housing discrimination or restrictive covenants that were based on race.

Thus, the actions of Congress and the Supreme Court marked the first real efforts to make private housing transactions subject to civil rights law and finally made it possible to hold homeowners and landlords legally responsible for housing discrimination. While Section 1982 at the time was construed only to apply to race discrimination, the Fair Housing Act as initially passed prohibited discrimination on the basis of **race, color, national origin and religion**.

The Act also opened up new avenues of enforcement of housing discrimination claims, including complaints to the U.S. Department of Housing and Urban Development and the Department of Justice, and private lawsuits in court.

Under its modern-day interpretation, the Act covers a broad range of housing-related transactions, some of which are explicit in the Act and some of which have been construed by courts under the Act's "otherwise make unavailable or deny" language.[6] The Act covers such transactions as rentals, sales, mortgage lending,[7] homeowners insurance,[8] zoning,

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[2] 42 U.S.C. §§ 3601-3619, 3631.

[3] For an excellent contemporaneous account of the political and social context of the passage of the Act, *see* Dubovsky, Fair Housing: A Legislative History and a Perspective, 8 Washburn L.J. 149 (1969), *reprinted at* http://www.fairhousing.com/legal_research/articles/dubofsky.pdf.

[4] 392 U.S. 409 (1968)

[5] 42 U.S.C. §1982

[6] 42 U.S.C. § 3604(a)

[7] 42 U.S.C. § 3605(b)(1). *See also, e.g.*, Laufman v. Oakley Building and Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976) (holding that "redlining," the practice of refusing to lend in certain neighborhoods because of their racial or other characteristics, is a violation of the Act); Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7 (D. D.C.

"blockbusting,"[9] appraisals,[10] tax assessment[11] and advertising.[12] It also makes it illegal to coerce, intimidate, threaten, or interfere with someone in the exercise of their fair housing rights[13] and provides for civil remedies and criminal penalties for doing so.[14]

Four years after the Act was passed, the U.S. Supreme Court had its first Fair Housing Act case. In *Trafficante v. Metropolitan Life Insurance Co.*,[15] the Court held unanimously that the Act was intended to have broad application and that, specifically, white persons denied the right to live in an integrated setting because of discrimination against African Americans have the right to sue. *Trafficante* was followed in 1974 by *Curtis v. Loether*,[16] in which the Court held that plaintiffs have a right to a jury trial under the Fair Housing Act.

Trafficante was one of many cases that defined broadly the class of potential plaintiffs in fair housing cases. Under the Act, "aggrieved persons" are proper plaintiffs in Fair Housing Act and are defined as:

> …any person who -
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> (1) claims to have been injured by a discriminatory housing practice; or
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> (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.[17]

Other important cases during this early phase of the Fair Housing Act were *Gladstone, Realtors v. Village of Bellwood*,[18] in which the court held that a municipality could be injured when its racial composition is adversely affected by race discrimination; *Havens Realty Corp. v. Coleman*,[19] holding that fair housing organizations and even "testers" – individuals who pose as prospective customers to gather evidence of discrimination – can have standing to sue for

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1999)(holding that a claim of "reverse redlining" – targeting certain neighborhoods for harmful loan products – is cognizable under the Fair Housing Act.)

[8] *See, e.g.,* Nationwide Mutual Insurance Company v. Cisneros, 52 F.3rd 1351 (6th Cir. 1995)(recognizing the Fair Housing Act's coverage of homeowners insurance discrimination); Housing Opportunies Made Equal v. Nationwide Insurance Company, 523 S.E. 2d 217 (Va. Sup. Ct. 2000)(jury verdict in state court awarding $100 million in punitive damages and $500,000 in compensatory damages for homeowners insurance discrimination).

[9] Defined as "…for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or with a handicap." 42 U.S.C. § 3604(e). *See* Zuch v. Hussey, 394 F. Supp. 1028 (E.D. MI 1973), *aff'd* 547 F.2d 1168 (6th Cir. 1977).

[10] 42 U.S.C. § 3605(b)(2). *See also, e.g.,* Hanson v. Veteran's Administration, 800 F.2d. 1381 (5th Cir. 1986).

[11] Coleman v. Seldin, 687 N.Y.S. 2d 240 (N.Y. Sup. 1999)

[12] *See, e.g.,* United States v. Hunter, 459 F. 2d 205 (4th Cir. 1972)(a homeowner who enjoys an exemption from some provisions of the Act still does not have the right advertise a discriminatory preference in violation of 42 U.S.C. § 3604(c)); Ragin v. New York Times Co., 923 F.2d 995 (2d Cir. 1991), *cert denied* 502 U.S. 821 (1991)(Fair Housing Act is violated when the use of human models of only one race in a housing advertisement conveys an illegal racial preference).

[13] 42 U.S.C. § 3717

[14] 42 U.S.C. § 3631

[15] 409 U.S. 205 (1972)

[16] 415 U.S. 189 (1974)

[17] 42 U.S.C. 3602(i)

[18] 441 U.S. 91 (1979)

[19] 455 U.S. 363 (1982)

discrimination; and *Town of Huntington, N.Y. v. Huntington Branch, NAACP*,[20] holding that a town violated the Fair Housing Act when it restricted development of multi-family housing projects in a largely minority urban area.

STAGE TWO: Sex discrimination

The Fair Housing Act remained substantially unchanged until 1974, when Congress added a prohibition of discrimination on the basis of sex. The change, which was barely debated, was a tiny part of the massive Housing and Community Development Act of 1974.[21] Its intent was to challenge the way landlords and other housing providers had used stereotypes to make it difficult for women to obtain housing. The sponsor, Sen. William Brock, R-TN, argued that "the assumption that men could perform these [homeownership] tasks while women could not is just the sort of discrimination based on sex that we are talking about."[22]

The new amendment meant that it would be illegal for landlords, lenders, real estate agents and others providing housing to impose different terms and conditions on women than on men. In *U.S. v. Reece*,[23] the court held that the landlord violated the Act when she required single women tenants to have cars and failed to take into account alimony and child support when determining whether divorced women were qualified to rent. Neither condition was imposed on men.[24]

Further, the addition of sex to the list of classes protected by the Fair Housing Act meant that the kinds of sexual harassment long prohibited in the workplace would now be covered in housing situations as well. The first reported sexual harassment case was *Shellhammer v. Lewallen.*[25] The plaintiffs were a married couple whose landlord requested that the woman pose for nude pictures and have sex with him. When she refused, the couple was evicted.

Because the Fair Housing Act did not explicitly characterize this kind of harassment as "sex" discrimination under the Act, the court looked to Title VII, the federal employment discrimination law, for guidance. The court held that the "quid pro quo" harassment the plaintiffs experienced was as illegal under the Fair Housing Act as workplace harassment of this kind had been for years.

The court also held that sexual harassment that created a "hostile environment" was also illegal under the Act but that the treatment the Shellhammers experienced was not severe or pervasive enough to constitute a hostile environment. Later cases, however, have applied the hostile environment theory to housing as well.[26]

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[20] 488 U.S. 15 (1988)
[21] Pub. L. 93-383 § 808, 88 Stat. 633, 729 (1974).
[22] *Hearings on S. 1604 before the Senate Subcommittee on Housing and Urban Affairs* 1228, 93rd Cong., 1st Sess. (1973), *quoted in* SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION (2002), 11C-2.
[23] 457 F.Supp. 42 (D. Mont. 1978)
[24] *See also* Morehead v. Lewis, 432 F.Supp. 674 (N.D. Il. 1977); HUD v. Rollhaus, Fair Housing-Fair Lending Rptr. ¶ 25,019 (HUD ALJ 1991).
[25] *1 Fair Hous. Fair Lend.* ¶ 15,472 (N.D. Ohio 1983)
[26] Greiger v. Sheets, Fair Hous, Fair Lend. Para. 15,605 (N.D. Il. 1989).

STAGE THREE: Handicap and familial status discrimination, broader coverage and enforcement options

The next – and most – significant amendment to the Act came in 1988 with the Fair Housing Amendments Act of 1988[27] ("FHAA"). The FHAA added two new classes of protection: "handicap" and "familial status," which is the presence or anticipated presence of children under 18 in a household.

In addition, the FHAA made major changes to the enforcement scheme of the Act, giving more authority to the Department of Housing and Urban Development to enforce the fair housing law. The FHAA also extended the statute of limitations for federal lawsuits from 180 days to two years and removed a $1,000 cap on punitive damages.

Discrimination on the basis of handicap

Before the FHAA, plaintiffs who experienced discrimination on the basis of disability were only able to sue governmental entities using Constitutional provisions such as the Equal Protection Clause or an anti-discrimination law applicable only to recipients of federal financial assistance, Section 504 of the 1973 Rehabilitation Act. Other plaintiffs found success before 1988 under state and local laws that banned housing discrimination against people with disabilities.

The FHAA opened up new avenues for enforcement of the rights of people with disabilities to live in the housing of their choosing. For the first time, private-party transactions where disability discrimination took place were subject to scrutiny in federal court.

The Act also opened up new theories of liability against cities whose zoning decisions stood in the way of development of housing options for people with disabilities in traditional single-family neighborhoods.

The Act defines "handicap"[28] as:

1. A physical or mental impairment that substantially limits one or more of a person's major life activities;
2. A record of having such an impairment; or
3. Being regarded as having such an impairment.[29]

In addition to the same prohibitions against discriminatory treatment that apply to the other six protected classes, the Fair Housing Act also requires housing providers to make reasonable accommodations to rules, policies and practices when necessary to provide a person with a disability with the same enjoyment of a dwelling;[30] to allow people with disabilities to make

[27] Pub. L. 100-430, 102 Stat. 1619-39 (1988).
[28] Though Congress used the now archaic term "handicap," the word "disability" will be used synonymously in this article.
[29] 42 U.S.C. § 3602(h)
[30] 42 U.S.C. § 3604 (f)(3)(B)

reasonable physical modifications of premises;[31] and to build certain multi-family housing after built since March 1991 with basic wheelchair accessibility.[32]

A large subset of the litigation that followed the passage of the 1988 amendments involved discriminatory zoning against group homes for people with disabilities. Although some had successfully used constitutional equal-protection arguments to challenge the discriminatory zoning decisions of municipalities even before the 1988 amendments,[33] the amendments would allow plaintiffs to challenge similar *non-governmental* land-use restrictions, such as restrictive covenants, and policies that simply have the effect, if not the intent, of restricting land-use options for homes for people with disabilities.[34]

The Act's requirement of "reasonable accommodations" in policies, practices, procedures and services has also been heavily litigated.[35] A number of cases have involved housing providers' responsibility to allow service or companion animals for people with disabilities even when they have a "no pets" rule in place.[36] At least a few of these cases involve public housing providers such as housing authorities who failed to accommodate disabled tenants. *HUD v. Dedham Housing Authority*[37] was the first HUD administrative law judge decision to levy a fine against a housing authority for violating the Act.

Discrimination on the basis of familial status

Prior to the passage of the 1988 amendments, housing providers (usually apartment complexes) were free to make housing available only to adults, leaving families with children with fewer housing options than those without. This problem came to light as early as 1980, when HUD conducted a study that found that 25 percent of the rental units surveyed banned children altogether and that another 50 percent restricted them in some way.[38]

The Act defines "familial status" as:

> (1) a parent or another person having legal custody of such individual or individuals; or
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> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or

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[31] 42 U.S.C. § 3604 (f)(3)(A)
[32] 42 U.S.C. § 3604 (f)(3)(C)
[33] *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)
[34] For a fuller overview of land-use litigation involving homes for people with disabilities, *see* TENNESSEE FAIR HOUSING COUNCIL, NAVIGATING NIMBY: A PUBLIC OFFICIAL'S GUIDE TO NEIGHBORHOOD LIVING FOR PEOPLE WITH DISABILITIES (2002), available on the Internet at http://tennessee.fairhousing.com/resources/navigatingnimby/navigatingnimby.pdf .
[35] Many of the zoning cases involved reasonable accommodation as one of the theories of discrimination; it has been held in several cases, for example, that a city violated the Act when it failed reasonably accommodate a group home by granting a requested variance or other zoning relief from single-family zoning restrictions.
[36] *See, e.g.*, Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133 (N.D. Cal. 2000); Bronk v. Ineichen, 54 F.3d. 425 (7th Cir. 1995); Green v. Housing Authority of Clackamas County, 994 F. Supp. 1254 (D. Or. 1998).
[37] HUDALJ 01-90-042-1
[38] ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION, 11E-3 (2002)

is in the process of securing legal custody of any individual who has not attained the age of 18 years.[39]

Under the Housing for Older Persons Act, a 1995 amendment to the Fair Housing Act, certain housing that is intended for and occupied by people who are at least 55 can legally discriminate against families with children ban children but still may not discriminate on the basis of race, color, national origin, religion, sex or disability.[40]

The constitutionality of the Act's familial status provisions was upheld in *Seniors Civil Liberties Association v. Kemp*.[41] The addition of familial status to the Act's protected classes means that housing providers can no longer refuse to deal with families with children, segregate children into certain housing units, restrict children's activities with special rules, charge higher security deposits, require families with children only to some areas or floors of a property, restrict the number of children in a unit, or refuse to rent to children of a certain age.[42]

STAGE FOUR: The near future of Fair Housing

Efforts to expand the act legislatively

For the past few years, Rep. Edolphus Towns, D-New York, has introduced legislation that would prohibit discrimination on the basis of "affectional or sexual orientation" in housing, employment, federal programs and public accommodations.[43] The last recorded introduction of this legislation was the Civil Rights Amendment Act of 2001,[44] introduced in January of that year. The legislation was assigned to two House subcommittees in February 2001, and no further activity has been reported.

Other legislation relevant to fair housing seeks to curb "predatory lending."[45] Predatory lending involves the making of loans, usually with a home as collateral, that are not in the borrower's best interest and that are likely to result in default and foreclosure. These loans often involve deceptive practices that are already illegal, but legislation now pending would further restrict such activity. Predatory lending is a housing discrimination issue because it is often targeted at individuals or neighborhoods based on race or some other protected class. A detailed description of each of these bills is outside the scope of this article.

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[39] 42 U.S.C. § 3602(k)

[40] *See* 42 U.S.C. § 3608(b)(2) and 24 C.F.R. 100.300-100-308 for more details about the requirements and limitations of this exception.

[41] 995 F.2d 1030 (11th Cir. 1992)

[42] *See, e.g.*, Seniors Civil Liberties Association v. Kemp, 995 F. 2nd 1030 (11th Cir. 1992); Hernandez v. Ever Fresh Co., 923 F. Supp. 1305 (D. Or. 1996); *Reeves v. Rose*, 108 F. Supp. 2d 720 (E.D. Mich. 2000); Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052 (E.D. Cal. 1998)

[43] As of July 2002, 12 states and almost 200 local governments (counties and cities) had such provisions in their civil-rights laws.

[44] H.R. 217, 107th Cong. (2001).

[45] Predatory Mortgage Lending Practices Reduction Act, H.R. 3807, 107th Cong. (2002); Protecting Our Communities From Predatory Lending Practices Act, H.R. 3607, 107th Cong. (2001); Save Our Homes Act, H.R. 2531, 107th Cong. (2001); Equal Credit Enhancement and Neighborhood Protection Act of 2001, H.R. 1053, 107th Cong. (2001); Community Reinvestment Modernization Act of 2001, H.R. 865, 107th Cong. (2001); Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. (2001); Predatory Lending Consumer Protection Act of 2002, S. 2438, 107th Cong. (2002).

Important litigation

The Supreme Court will hear two cases in its next term involving the Fair Housing Act. The outcomes of those cases will help define two major issues of law in fair housing litigation: the responsibility of real estate brokers for the bad acts of the agents who work for them, and the limits of the "disparate impact" theory of Fair Housing Act liability. "Disparate impact" occurs when an apparently neutral policy places more of a burden on a particular group based on a protected class.

In the first case, *Holley v. Crank,*[46] the Ninth Circuit held that the individual who was the president, owner and sole shareholder of a small real estate company could be held legally responsible for the race discrimination committed by an agent working for him, even if the acts occurred without his knowledge. The court followed the general rule of "vicarious liability" under Fair Housing Act litigation that makes employers responsible for the acts of their employees:

> While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the innocent victim who felt the direct harm of the discrimination.[47]

The Supreme Court's decision to review the 9th Circuit causes concern among some fair housing advocates that the Court may seek to narrow traditional vicarious liability in the context of fair housing cases. However, there is a long line of cases supporting vicarious liability.[48]

The second case, *Buckeye Community Hope Foundation v. City of Cuyahoga Falls,*[49] involved the defendant city's decision to hold a referendum that ultimately rejected a non-profit's plan to construct affordable multi-family housing. The Sixth Circuit reversed the trial court's grant of summary judgment for the city, and the city filed a petition for review by the U.S. Supreme Court. The Court has granted review of the following Fair Housing Act issues:

- Whether a court can impute the discriminatory motives of a handful of citizens vocally opposed to an affordable-housing development to the city to determine whether the city intended to discriminate against the development by holding the referendum; and
- Whether, "in light of the constitutional freedom of political expression," a plaintiff can claim that a facially neutral referendum has a disparate impact on the basis of race and familial status.

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[46] 258 F.3d 1127 (9th Cir. 2001), *cert. granted sub nom.* Meyer v. Holley, 122 S. Ct. 1959 (2002).
[47] 258 F. 3d at 1131-1132.
[48] *See, e.g.*, City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, *cert. denied*, 508 U.S. 972 (1993); U.S. v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971), *aff'd sub nom.*U.S. v. Bob Lawrence Realty, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973)(holding that the duty not to discriminate cannot be delegated).
[49] 263 F.3d 627 (6th Cir. 2001), *cert. granted,* 122 S. Ct. 2618 (2002).

Current law is clear that evidence about discriminatory motives of residents can be imputed to decision makers,[50] so a reversal by the Supreme Court on this issue would be a repudiation of fairly well-settled case law.

The Court is expected to hear oral arguments in both cases in December 2002 and to rule in spring or summer 2003.

CONCLUSION

For the most part, courts have respected Congress' wish to have the Fair Housing Act broadly applied to all kinds of housing-related transactions involving all kinds of parties. Generous interpretations of the law have allowed it to adapt to new issues, and its flexibility will allow the Act to evolve and endure for as long as necessary.

[50] *See, e.g.*, U.S. v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1976), *cert. denied*, 422 U.S. 1042 (1975);